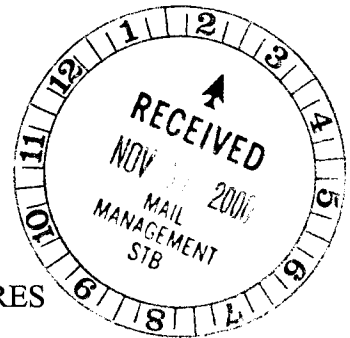


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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)

Notice of Proposed Rulemaking
MAJOR RAIL CONSOLIDATION PROCEDURES



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**AMERICAN PUBLIC TRANSPORTATION ASSOCIATION'S
COMMENTS**

Overview

In response to the Surface Transportation Board's publication of the Notice of Proposed Rulemaking on modifications to its regulations at 49 CFR part 1180, subpart A (49 CFR 1180.0 – 1180.9) governing proposals for major rail consolidations, the American Public Transportation Association (APTA) is pleased to submit the following comments on procedures and regulations used by the Surface Transportation Board (STB) in reviewing and approving major railroad consolidations. Current merger regulations were adopted soon after passage of the Staggers Act of 1980, at a time when railroads were in critical need of a process that would allow them to take actions to rationalize what at that time was a significant degree of excess rail infrastructure. While these merger regulations were a proper and reasoned response to the serious problems affecting railroads and their customers at that time, APTA is pleased that the STB is changing course by proposing to place a significantly increased burden on new merger applicants. APTA continues to emphasize, however, the importance of the Board considering the impact of any such mergers on passenger rail providers. We add that the Board's consideration of passenger rail impacts should include, in addition to commuter railroads, the impact on rail transit systems that are users or potential users of the tracks and/or right-of-way of the affected freight railroads, in accordance with policies of the Federal Railroad Administration.

About APTA

APTA is a nonprofit international association of over 1,300 member organizations including transit systems; planning, design, construction and finance firms; product and service providers; academic institutions, and state associations and departments of transportation. APTA members, including commuter railroads and rail transit systems, serve the public interest by providing safe, efficient and economical public transportation services and products.

Summary of Comments

On February 28, 2000, and May 16, 2000, APTA submitted comments on the general subject of major rail consolidations, and the present and future structure of the North American railroad industry. The comments were presented on behalf of the nation's public transportation industry, which in many instances uses the track or right-of-way of various freight railroads throughout North America. The following comments are a continuation of those ideas, and make the following recommendations as to how the Board's regulations should be changed--

- 1) STB should carefully consider the impacts of mergers on existing and future rail passenger services as a key factor in its determination on the merger itself. Any adverse impacts to rail passenger operations should be weighed, as a public policy issue, in the decision as to whether or not to approve any merger.
- 2) If there are any existing or future rail passenger operations that will be adversely affected by a merger, STB should consider ways to mitigate the impacts of that merger on such operations by granting additional access rights in that corridor, or by granting rights to prospective new services.
- 3) In its approval of railroad mergers, we urge the STB to maintain a strong oversight role to protect the interests of rail passengers.

STB Overall Approach

APTA appreciates and supports the STB's new policy statement, which represents a major shift from a pro-merger approach to one that places a significantly increased burden on merger applicants to demonstrate that the proposed merger transaction would be in the public interest. Recent consolidations have led to significant transitional service problems, which have harmed the public interest. Experience has shown that mergers can and will disrupt operations in ways never contemplated in merger filings and service contracts, and special action needs to be provided for in those circumstances. For example, consolidation of dispatching operations to more distant centralized dispatch centers is a common consequence in the merger context. In Chicago, the Regional Transportation Authority of Northeast Illinois (Metra) has incurred service disruptions with such consolidations, notwithstanding assurances from the merging carriers that transitions would go smoothly. VRE and MARC experienced similar results in the Conrail acquisition.

In addition, further consolidation will likely aggravate the access challenges that passenger rail systems that are in the planning and design stages already face. Unfortunately, a shortcoming exists in the current framework in which new passenger rail projects move forward: specifically, a process for helping resolve disagreements which may arise when parties cannot agree on terms and conditions for use of a railroad right-of-way. Currently, no such process or venue exists for consideration of public interest issues. Freight railroads can, and often do, unilaterally deny access to passenger rail agencies, sometimes for legitimate reasons, but often for dubious reasons or for no reason at all other than not wanting passenger rail operations. Public agencies so denied have no recourse under the existing framework. We are thus concerned that a proposed merger may make what is already a difficult process even more so.

It is important to note that the normal way a state or regional public transportation agency would gain access to property needed for public improvements would be through eminent domain proceedings. However, state law based condemnation authority does not extend to property owned by freight railroads, which come under the interstate authority of the STB.

APTA and the Association of American Railroads (AAR) have met to discuss the possibility of an industry-wide framework to help facilitate the negotiation of local agreements. While these discussions have identified numerous areas of mutual benefit, we have not been successful in negotiating any process for resolving disputes.

Finally, in its review of major rail consolidations, STB should note that the ability of rail passenger agencies to obtain the rail access agreements they need to serve the public is a very difficult task under normal circumstances, but becomes even more complex with a continually downsizing core system with fewer and larger owners.

Enhancement of Competition

APTA is pleased with the STB's recognition that further consolidations in the rail industry are likely to result in some competitive harms that are difficult to remedy directly. We urge the Board to require merger applicants to address separately and specifically the issue of competitive harm to passenger rail projects, both currently in operation and projects which have been under public consideration. The Board should also use its conditioning power to mitigate and offset competitive harms to passenger rail, and to explicitly include passenger rail interests in its analysis of the public interest.

It is important to note that new commuter rail operations are almost always contracted out to existing railroads. In this respect, our new start members need a competitive rail industry with alternative contract operators in order to keep contract costs under control. Further consolidations in the freight industry will, in all likelihood, result in increased trackage rights costs and increased operations contracts cost to public agencies unless there is a healthy measure of competition in the market.

Assessment of Benefits/Harms

APTA supports a thorough analysis by STB of claimed benefits by merger applicants. APTA also supports the Board's continued involvement in ensuring that the claimed benefits materialize. To this end, APTA would support the establishment of a mechanism whereby those affected by a merger could bring their disputes for fair and speedy resolution by the STB in situations where benefits that were claimed by merger participants have not materialized.

APTA also supports the Board's assurance that essential passenger and commuter rail services are to be preserved in the consideration of potential harms associated with proposed mergers. However, we are somewhat concerned about how "essential existing service" would be defined. The proposed regulation states:

An existing service is essential if there is sufficient public need for the service and adequate alternative transportation is not available.

We would like further explanation of how this definition would work in evaluating harm to essential services. When commuter rail is built in any given region, the choice of that mode is often the outcome of a long, locally-driven planning process in which several issues have been considered, including congestion mitigation, air quality, and cost. These considerations demonstrate public need and the inadequacy of other local transportation alternatives for a significant portion of the local population.

Too often in the past, passenger rail properties have borne the brunt of the harmful effects of mergers. It seems that STB was often aware of these harmful effects, yet proceeded nonetheless. We note that the STB has recognized labor's right not to have the harmful effects of mergers "crammed down" upon them. We would ask that, in the future, passenger rail operators receive at least this level of consideration when mergers are contemplated by the Board.

Downstream Effects

APTA commends the STB for considering downstream effects associated with further consolidation. Across America, rail passenger service is in the midst of a rebirth. The Transportation Equity Act for the 21st Century (TEA 21) alone authorizes over 200 new passenger rail projects (new starts), about half of which are likely to use existing rail freight corridors. STB's examination of the future of America's railroads must take into account this growth trend. To some extent, since these new starts often rely on unused freight rail capacity or right-of-way to start their own systems, mergers that eliminate all unused capacity will stifle the future growth of passenger rail. In addition, access negotiations, which are never simple, become more difficult when passenger rail systems must negotiate with what are, in essence, oligopolists. With little competition and no other recourse for getting fair access to rail right-of-way, new passenger rail systems would face an even steeper uphill climb with further consolidation of freight railroads.

Service and Oversight

APTA supports the proposed requirement for applicants to submit detailed service assurance plans, including contingency plans, to permit the Board to assess proposed consolidated operations prior to approval. However, we would ask that the proposed Service Council's role be enhanced. The Board's regulation should specifically identify commuter and passenger rail entities as participants on this Council, rather than presuming that they may be included as "other interested persons." Indeed, an additional Council might be necessary to give focused attention to commuter and passenger rail issues in a post-merger environment.

In addition, the Board needs to ensure that attention is given to system-wide impacts, and not just to the new territories affected by the merger. In the case of the Conrail acquisition, passenger service problems were generally in the established portions of the system, not in the newly affected areas. Reporting requirements need to be established at the beginning of the process and need to be monitored on a continuing basis. The Board should commit to oversight of these plans for a period of at least five years.

Mergers can impact commuter railroads in instances where freight railroads operate on tracks owned by commuter railroads. Freight traffic volumes anticipated in STB filings and discussed with the passenger rail organizations may turn out to be inaccurate, creating problems for the commuter railroad owner. We believe that a formal approval process needs to be established in which these commuter railroad owners must agree to projected freight volumes and that they not be forced to accept increased volumes that occur after the merger.

In short, whether through a Service Council or directly through the Board, a mechanism needs to be created whereby complaints related to mergers can be received and promptly resolved. Rather than simply requiring reporting and forums for discussion, the Board should mandate arbitration on deviations from the service assurance plans. Undelivered promises from merger participants should be enforced by the STB. For example, if track improvements are needed in order to maintain service levels promised in the service assurance plan, STB should be empowered to direct the railroad to complete the needed track improvement.

Impacts on Rail Passenger Service Must Be a Prime Consideration in Merger Determinations

Finally, APTA urges the Board to fully consider the potential impacts of mergers on passenger operations. We emphatically agree with STB's emphasis on the need for service improvement. We are equally emphatic that this focus on improved operations must extend to passenger as well as freight services. In some cases, this will require careful Board oversight of operating and dispatching matters.

Historically, America's rail corridors have been used for both freight and passenger purposes. At one time, both were operated by the private sector under laws governing public utilities - laws that recognized the public interest in the system. As passenger operations became unprofitable, private railroads were relieved of the obligation to operate passenger service directly. Services were often taken over and supported financially by public entities. STB's review and oversight must recognize the evolving rail passenger industry, and its critical inter-relationship with the rail freight industry.

Accordingly, APTA suggests the following three principles for STB to consider in its review of merger requests:

- 1) STB should carefully consider the impacts of mergers on existing and future rail passenger services as a key factor in its determination on the merger itself. Any adverse impacts to rail passenger operations should be specifically determined and weighed, as a public policy issue, in the decision as to whether or not to approve any merger. This consideration should be given to both existing passenger rail projects and proposed passenger rail projects; in addition, this consideration should be given regardless of whether a passenger rail property owns its railroad right-of-way or operates on freight tracks.

- 2) If there are any existing or future rail passenger operations that will be adversely affected by a merger, STB should mitigate the impacts of that merger by granting additional access rights in that corridor, by granting rights to prospective new services, or by directing the merging railroads to take other action to remedy the situation.
- 3) In its approval of railroad mergers, we urge the STB to maintain a strong oversight role to protect the interests of rail passengers.

APTA thanks STB for the opportunity to comment. We would be pleased to provide any additional information that may be useful to the Board.

Respectfully submitted by:

A handwritten signature in black ink, appearing to read "William W. Millar", written in a cursive style.

William W. Millar
President

CERTIFICATE OF SERVICE



The undersigned hereby certifies that on the 17th day of November, 2000, he served a true and correct copy of the above and foregoing document on all parties of record on the Service list (Appendix A of the notice To Parties in this proceeding served April 28, 2000, May 10, 2000 and May 12, 2000) in accordance with the Surface Transportation Board's Rules of Practice by:

☒ United States mail, first class postage prepaid

☐ Facsimile transmission

☐ Hand delivery

William W. Millar
President
American Public Transportation Association

LETTER TO THE SECRETARY
OFFICE OF THE SECRETARY

NOV 17 2000

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